Petition

81-911

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

UNITED STATES OF AMERICA
Plaintiff/Respondent

versus

JAMES HARRY WHITE
Defendant/Petitioner

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the review of petitioner's conviction was constitutionally adequate in view of the loss of a portion of the record on appeal.

2. Whether the conduct of the prosecutor at the trial was so unfair and improper that it deprived the petitioner of his right to a fair trial.

3. Whether certain evidentiary rulings at the trial deprived petitioner of his right to a fair trial.

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OPINION BELOW

The unreported per curiam decision of the United States Court of Appeals for the Fifth Circuit (now Eleventh Circuit) was entered on June 26, 1981. A denial of a Petition for Rehearing was entered on September 11, 1981.

STATEMENT OF JURISDICTION

Petitioner was convicted on September 17, 1980 on two counts of a four-count indictment charging willful evasion of federal income taxes. Petitioner's Motion for Judgment of Acquittal or For New Trial was denied on December 22, 1980 and a notice of appeal to the United States Court of Appeals for the Fifth Circuit was filed on November 10, 1980. The Court of Appeals affirmed the decision and judgment below in a per curiam decision on June 26, 1981 and denied petitioner's Petition for Rehearing on September 11, 1981.

Review is sought in this Court pursuant to 28 U.S.C. Section 2101 and Rules 17.1(a) and (c) of the Supreme Court Rules.

STATUTES AND RULES INVOLVED

U.S. Constitution, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Internal Revenue Code of 1954 (26 U.S.C.) Section 7201:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

28 U.S.C. Section 1735(b):

Whenever the United States is interested in any lost or destroyed records or files of a court of the United States, the clerk of such court and the United States attorney for the district shall take the steps necessary to restore such records or files, under the direction of the judges of such court.

STATEMENT OF THE CASE

A four count criminal indictment was entered against the petitioner on February 20, 1980 charging him with a violation of Section 7201 of the Internal Revenue Code (26 U.S.C. § 7201) by the filing of false and fraudulent income tax returns for the years 1973, 1974, 1975 and 1976. A jury verdict of not guilty was rendered on Counts I and II of the indictment and a verdict of guilty was rendered on Counts III and IV of the indictment on September 17, 1980. A Motion For Judgment Of Acquittal Or, In The Alternative, For A New Trial was filed by the petitioner on October 2, 1980 following the granting of an extension on September 25, 1980 of the time to file such a motion. The Motion for Judgment of Acquittal was denied on December 22, 1980 and a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit (now Eleventh Circuit) was filed on November 10, 1980. The verdict on Counts III and IV was affirmed per curiam by the Court of Appeals on June 26, 1981 and a Petition for Rehearing was denied on September 11, 1981.

Petitioner, James Harry White, was employed as a salesman and associate regional manager of the Provident Life and Accident Insurance Company in its Atlanta, Georgia office from 1956 until sometime in 1976. As a member of the sales staff of the Atlanta office of Provident, petitioner was involved primarily with group medical insurance sales. Claims for reimbursement of medical expenses covered by group medical insurance policies underwritten by Provident were submitted directly to the Atlanta office by covered employers. When all necessary information had been ob-

tained or was included on the claim form, a Provident claims examiner then processed the claim by computing the benefits payable and typing a claim draft in the proper amount. None of the sales personnel, including petitioner, had any part in claims processing and payment, and none were authorized to sign claim drafts on behalf of Provident.

As a result of a minor discrepancy in the amount involved in a particular claim sometime during 1976, it was discovered that that claim was fictitious and that no record of the individual claimant existed at the employer company or at the hospital where the fictitious employee had allegedly obtained services. The claim was paid by the claims examiner, but an investigation was begun in Provident's home office by examining all claim drafts within a predetermined dollar range paid through the Atlanta office over a five-year period through mid-1976. As a result of this investigation, 58 claim drafts were discovered which contained two endorsements on the back of the drafts, the second of which was that of the petitioner. Officials of Provident concluded that the petitioner had obtained the funds represented by the drafts because he was the second endorser on each draft.

In addition to his work for Provident, petitioner and his sister-in-law, Mary L. Branton, who had recently received her state insurance sales license, formed a small insurance company in 1972 for the purpose of collecting commissions on certain insurance accounts. Mary Branton retained five percent of the gross commissions received by the Company in payment for bookkeeping and accounting services and the balance of the commissions were paid either to petitioner or to

other persons working for M. L. Branton & Company. All income distributed to petitioner directly was included on his federal income tax returns for the appropriate years.

A portion of the commissions received by M. L. Branton & Company was also contributed to the capital of North Georgia Millwright & Erecting, Inc., in which petitioner was a fifty percent stockholder and the sole capital contributor. The company received these contributions out of commissions earned by M. L. Branton & Company in 1974 and in 1975, which were not included in petitioner's income on his understanding that income contributed to the capital of a corporation was tax free until later withdrawn. IRS Forms 1099 indicating payment of these funds by M. L. Branton & Company to North Georgia Millwright & Erecting, Inc. were prepared and sent to the corporation and to the Internal Revenue Service.

An Internal Revenue Service investigation of petitioner was initiated because of an anonymous letter sent to the Service and, as a result, it was determined by the Service that petitioner had failed to report all of his income tax liability on his joint federal income tax returns filed with his wife for the years 1973, 1974, 1975 and 1976. The single major item making up the alleged tax deficiencies for the years in question was the income reflected on the drafts from Provident Life & Accident Insurance Company, with Mr. White's name as the second endorsement, totaling $11,176.50 in 1973, $11,855.35 in 1974, $14,916.80 in 1975, and $8,324.05 in 1976. The theory for including these amounts as income to petitioner was that he received the funds represented by the drafts because his en-

dorsement on each draft was the last one. Petitioner contended, and was supported by testimony of two bank tellers cashing some of the drafts, that he signed solely as an accommodation endorser for the named payee who received the funds from cashing the draft, and that petitioner got none of the funds. On the basis of the Government's summary chart, admitted into evidence at trial as Government Exhibits 234 through 239, the alleged omissions from income and adjustments to income on which the prosecution theory was based were as follows:

SUMMARY COMPUTATIONS
[Government Exhibits 234-239]

	Years and Amounts			
Particulars	1973	1974	1975	1976
SUMMARY OF CRIMINAL PROSECUTION ITEMS:				
Items Not Included In Income:				
Check drafts from Provident Insurance Co. endorsed with White's name	$11,176.50	$11,855.35	$13,972.55	$ 8,324.05
Income from Maxine L. Calhoun			4,004.20	5,070.00
Income from A. Patrick Bowles	1,839.27			
Income from M. L. Branton and Company	10,479.92	—0—	5,524.88	2,312.74
Income from Rental Value of Personal Auto Furnished by North Georgia Millwright Co., Inc.				
Less: Limitation on Constructive Dividends for Auto Based on Available Retained Earnings & Dividend Exclusion				629.16

Less: Reported Income Unaccounted for	1,844.29			
Unexplained Deductions for Insurance Commissions Paid To:				
North Georgia Millwright & Erecting Company	—0—	1,386.00	2,400.00	—0—
Minerva Gay	870.75	2,423.70	3,572.14	1,660.00
TOTAL	$22,522.15	$15,665.06	$29,473.77	$17,995.95
Less: Correction of Prior Audit	—0—	113.68	173.90	—0—

Petitioner contested each item of alleged unreported income and the disallowance of the alleged unexplained deductions, but, as noted, a jury found petitioner guilty of tax evasion with respect to the years 1975 and 1976 and not guilty for the years 1973 and 1974 after four days of deliberations.

The record on appeal consisted of nine volumes, made up of one volume (Volume I) of original documents and eight volumes of transcript, and was transmitted to the United States Court of Appeals for the Fifth Circuit for use on appeal; however, sometime immediately preceding the oral argument on June 24, 1981, Volume I of the record was apparently lost in the Clerk's office. By letter dated July 10, 1981, counsel for petitioner and the United States Attorney were notified that Volume I was lost and that it would be necessary to attempt to reconstruct the record according to the procedure set out in 28 U.S.C. Section 1735(b). By letter dated August 10, 1981, the clerk of the district court transmitted the reconstructed Volume I of the record to the United States Court of Appeals for the Fifth Circuit but listed certain items in the original record which could not be replaced. Included on this list of missing items were petitioner's requests to charge

the jury and the several handwritten notes received by the district court from the jury during their deliberations, which also contained the trial court's handwritten responses to the questions asked by the jury in some of their notes.

ARGUMENT

I

REVIEW OF PETITIONER'S CONVICTION WAS CONSTITUTIONALLY INADEQUATE IN VIEW OF THE LOSS OF A PORTION OF THE RECORD ON APPEAL

The loss of Volume I of the record on appeal, containing all documents relating to the indictment and prosecution of petitioner other than the trial exhibits, necessarily resulted in an inadequate appellate review of petitioner's conviction. Petitioner contended on his appeal to the United States Court of Appeals for the Fifth Circuit that the trial court's refusal to grant certain of petitioner's requested jury instructions was erroneous and required a remand for a new trial. Without Volume I of the record, which contained the petitioner's Requests to Charge, the Court of Appeals was unable to consider the appropriateness of the requested instructions. Moreover, nowhere else in either the transcript of the trial or in the available record is there a verbatim statement of the requested, but refused, instructions. These instructions were also not a part of the reconstructed Volume I. Similarly, petitioner contended on appeal that the responses of the trial court to several handwritten notes submitted by the jury during its four days of deliberations were im-

proper, yet neither the several handwritten notes nor the Court's handwritten responses were available to the Court of Appeals for its review. Again, nowhere else in the record, even as it was reconstructed, is there a verbatim statement of either the contents of these handwritten notes or the trial court's responses. The transcript of the trial itself contains reference only to one note of the jury, but not to the other notes or to the trial court's handwritten responses to those notes.

Argument on the appeal of petitioner's conviction was held on June 24, 1981 and the per curiam affirmance of the conviction was entered on June 26, 1981. The Petition for Rehearing was filed on July 10, 1981, the same date on which the letter was mailed by the clerk of the Court of Appeals notifying the parties that Volume I of the record had been lost and had to be reconstructed. Therefore, the Court of Appeals never considered the matters raised by petitioner on appeal based upon the documents in Volume I of the record and never considered the constitutional effect of undertaking appellate review in the absence of the full record.

While appellate review of a criminal conviction is not required under the due process clause of the Fifth Amendment to the United States Constitution (*United States v. MacCollom*, 426 U.S. 317 (1978)), where an appeal is authorized, as in this case, then all constitutional due process requirements must be satisfied. *Castle v. United States*, 399 F.2d 642 (5th Cir., 1968); *Doyle v. United States*, 366 F.2d 394 (9th Cir., 1966).

In this regard, a criminal defendant is entitled to a record on appeal of sufficient completeness to permit proper consideration by the appellate court of the defendant's contentions on appeal. *Bradshaw v. State of Oklahoma,* 398 F. Supp. 838 (D.C. Okl., 1975); *United States v. Silva,* 559 F.2d 1313 (5th Cir., 1977). Where the record is not complete, a statutory mechanism is provided to restore the record, if possible. *See,* 28 U.S.C. § 1735. If the record cannot be restored or a substitute record provided, then a criminal defendant cannot be afforded an appellate review which satisfies due process requirements. *United States v. Ullrich,* 580 F.2d 765 (5th Cir., 1978) reh. denied, 589 F.2d 1114 (1979); and *see, United States v. Burnett,* 476 F.2d 726, 729 (5th Cir., 1979); *Cole v. State of Arkansas,* 333 U.S. 196 (1948). The only judicial remedy when the missing record is directly involved in and critical to issues on appeal is to remand the case to the trial court for further proceedings. Otherwise, the appellant is prejudiced in his appeal right. Therefore, since the missing record is unable to be reconstructed and is critical to a proper review of his conviction, to afford petitioner the due process required by the Fifth Amendment to the Constitution his conviction must be reversed and the case remanded for a new trial. *United States v. Butler,* 499 F.2d 1006 (D.C. Cir., 1974); *United States v. Bryant,* 439 F.2d 642, 653 (D.C. Cir., 1971). The action of the Court of Appeals in failing to provide adequate appellate review has departed so far from the accepted and usual course of judicial proceedings that a review of that action on a writ of certiorari is necessary pursuant to Rule 17.1(a) of the Supreme Court Rules.

II

CONDUCT OF THE PROSECUTOR WAS SO UNFAIR AND IMPROPER THAT PETITIONER WAS DENIED A FAIR TRIAL

During the course of the trial, the prosecutor asked questions of certain witnesses concerning several letters addressed to Provident in order to show that the signature on the letters was not that of the person purporting to have signed them. These letters were, however, never offered into evidence and, consequently, petitioner had no opportunity to object to their introduction. Nevertheless, despite the fact that these documents were not introduced into evidence and there was no attempt by the prosecution to implicate the petitioner in any forgery connected with these documents, the prosecutor in his closing argument to the jury repeatedly referred to the numerous forgeries of the petitioner. In addition, the prosecutor made continual reference to the petitioner in his closing as a "wheeler-dealer" and "con artist", and to the petitioner's wife as a "social climber", without any justification in the record for such statements and solely for the purpose of unduly prejudicing the jury against the defendant. Finally, without any support in the record or any attempt to establish a factual basis for such a statement, the prosecutor told the jury that any document which had been shown to be missing from the Provident files should be attributed to petitioner and that petitioner destroyed these files to prevent their use as evidence in determining his taxable income. The prosecutor also stated in his concluding remarks to the jury that there was "far more income" due and owing from the defendant than had been proved by

the prosecution at the trial and that "we do know" that the petitioner got other money not included in the government's summary charts, despite the lack of any justification for such a statement.

This and similar conduct of the prosecutor, deliberately misconstruing the evidence and referring to matters clearly not in the record in the case was designed solely to prejudice the defendant in the eyes of the jury and thereby prevented a fair trial. Such conduct is a denial of the due process guaranteed to petitioner under the Fifth Amendment and requires reversal of his conviction and a remand for a new trial. A writ of certiorari should be granted to review the action of the Court of Appeals, which is not in conformity with the weight of authority. *See, United States v. Sanchez,* 482 F.2d 5 (5th Cir., 1973); *United States v. Scaglione,* 446 F.2d 182 (5th Cir., 1971), *cert. denied,* 404 U.S. 941; *Burwell v. Teets,* 245 F.2d 154 (9th Cir., 1957), *cert. denied,* 355 U.S. 896, reh. denied 355 U.S. 927.

III

EVIDENTIARY RULINGS OF THE TRIAL COURT DENIED PETITIONER'S OPPORTUNITY TO FULLY DEVELOP HIS DEFENSE AND DEPRIVED HIM OF A FAIR TRIAL

For the purpose of explaining its theory of prosecution, the prosecution offered into evidence its large summary charts, reproduced at page 5, *supra,* to which the petitioner objected on the grounds that no factual basis for all the entries on the charts had been established in the record. The trial court gave the jury a

cautionary instruction at the time the charts were admitted, but the court did not charge the jury in its instructions given at the end of the case, several days later, as to the proper weight to be given to the summary charts. Rather, the summary charts were submitted to the jury without any further limiting instruction, pursuant to a general instruction to the jury to consider and weigh all of the evidence admitted during the trial.

The charts summarize items which the prosecution alleged were not included in the income of the petitioner, but should have been so included. These summaries listed the total amounts, by years, represented by the Provident claim drafts bearing the defendant's name as the second endorser based on the prosecution theory that all of the named payees were fictitious and that petitioner received the funds as the last endorser. The totals, however, included a number of drafts with respect to which the Government failed to prove that the individuals in whose names the drafts had been made payable were not, in fact, actually employees of the companies in question. The inclusion of the amounts of these latter drafts as income in the summary charts, over the objection of the petitioner, is reversible error.

The charts also contained references to items of income from an automobile allegedly provided to petitioner by North Georgia Millwright & Erecting Co., Inc. with respect to which no dollar figures were introduced at trial. No contention was ever made at trial that any amounts relating to these items should be included as income to petitioner. The introduction of the charts into evidence containing references to these

items was clearly improper and unduly prejudicial to the petitioner inasmuch as it indicated that there were other items of unreported income which the prosecution was aware of but had not disclosed to the jury. This error was compounded by the prosecutor's statement to the jury to the same effect.

The charts also included adjustments made by an Internal Revenue Service agent based upon errors, expressly admitted at trial by other agents, which had been made in a prior civil audit of the petitioner's tax returns for the years in question. There was, however, no testimony or other foundation in the record relating to the propriety or the accuracy of these adjustments or to the method used by the agent in making the adjustments.

Where a summary chart is not supported by evidence in the record, permitting such a chart to be introduced into evidence and to be taken into the jury room is reversible error. *See, Holland v. United States*, 348 U.S. 121 (1954); *Baines v. United States*, 426 F.2d 833 (5th Cir., 1970); *Steele v. United States*, 222 F.2d 628 (5th Cir., 1955). Therefore, permitting these summary charts to be introduced into evidence and to be taken into the jury room was error in this case, and the Court of Appeals should have reversed petitioner's conviction and remanded the case for a new trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should be issued to the United States Court of Appeals for the Fifth (now Eleventh) Circuit to review its per curiam affirmance of the verdict below.

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CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of the foregoing Petition for Certiorari by depositing the same in the first class, United States mail, postage prepaid this 10th day of November, 1981 addressed as follows:

Solicitor General of the United States
United States Department of Justice
Washington, D.C. 20530

ROBERT J. HIPPLE

APPENDIX

1. Verdict
2. Order dated December 18, 1980
3. Per Curiam affirmance dated June 26, 1981
4. Order denying Petition for Rehearing dated September 11, 1981

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	)	
vs.	)	CRIMINAL NO. CR80-38A
JAMES HARRY WHITE	)	

V E R D I C T

We, the jury, find the defendant JAMES HARRY WHITE:

NOT GUILTY on Count 1;

NOT GUILTY on Count 2;

GUILTY on Count 3; and

GUILTY on Count 4.

This 17th day of September, 1980.

/s/ H. D. Holland

FOREPERSON

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	)	
vs.	)	CRIMINAL NO. CR80-38A
JAMES HARRY WHITE	)	

O R D E R

This criminal action, in which defendant was convicted of income tax evasion, Internal Revenue Code § 7201, is currently before the court on defendant's motion for judgment of acquittal or alternatively for a new trial. Having read and considered defendant's motion, the court hereby DENIES the same.

So ORDERED, this 18th day of December, 1980.

/s/ Newell Edenfield

NEWELL EDENFIELD
United States District Judge

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNIT B

NO. 80-7949

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES HARRY WHITE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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(June 26, 1981)

Before FRANK M. JOHNSON, JR., and HATCHETT, Circuit Judges, and SCOTT* District Judge.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*District Judge of the Middle District of Florida sitting by designation.

1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F.2d 966.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNIT B

NO. 80-7949

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES HARRY WHITE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion June 26, 1981, 5 Cir., 198_, ___ F2d ___).
(Sep. 11, 1981)

Before FRANK M. JOHNSON, JR. and HATCHETT, Circuit Judges, and SCOTT* District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council

Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. W. Hatchett

United States Circuit Judge

Opposition

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CLERK

No. 81-911

In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES HARRY WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether appellate review of petitioner's conviction was constitutionally adequate, notwithstanding the fact that the first volume of the record on appeal was lost and not completely reconstructed.

2. Whether references to forged documents and other remarks made during the prosecution's closing argument substantially impaired petitioner's right to a fair trial.

3. Whether the trial court correctly exercised its discretion in admitting into evidence the government's summary charts.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-911

JAMES HARRY WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam decision of the court of appeals (Pet. App. 18) is unreported.

JURISDICTION

The decision of the court of appeals[1] was entered on June 26, 1981 (Pet. App. 18), and a petition for rehearing was denied on September 11, 1981 (Pet. App. 19-20). The petition for a writ of certiorari was filed on November 10, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]The case was decided by Unit B of the United States Court of Appeals for the Fifth Circuit, which on October 1, 1981, became the United States Court of Appeals for the Eleventh Circuit.

STATEMENT

1. After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on two counts of willfully attempting to evade and defeat income taxes that he and his wife owed for the years 1975 and 1976,[2] in violation of 26 U.S.C. 7201 (9-R. 1571-1574).[3] He was sentenced to concurrent terms of five years' imprisonment, with five months to be served in a "jail-type" institution, and the balance suspended. He was also placed on five years' probation with the condition that he pay a fine of $10,000 for each count (1-R. 1685). The court of appeals affirmed by per curiam order.

2. At trial, the government established that petitioner embezzled from Provident Life & Accident Insurance Company (Provident), without reporting as income, approximately $13,900, and $8,300, respectively, for the years 1975 and 1976 (3-R. 356; 4-R. 430, 438, 442, 452, 488, 536, 546, 556-558, 590, 600-601; 5-R. 640, 691, 706-708, 717, 725-726). The government also established that petitioner failed to report in 1975 and 1976 insurance commissions he received through the M.L. Branton Company, a company effectively under his control (4-R. 615-622; 5-R. 786-787; 6-R. 904-913; Exhs. 126-127, 137-139, 142).

The evidence at trial also revealed that petitioner failed to report income he received when he entered into an agreement with Maxine L. Calhoun, a licensed insurance broker, to share insurance commissions he generated from Provident (5-R. 738). Calhoun testified that she paid petitioner his share by personal check. Evidence at trial also showed that in 1976 petitioner received from Provident through E.C. Brook, a Provident sales representative at the Atlanta

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[2]Petitioner was acquitted on counts covering the years 1973 and 1974.

[3]"R." references are to the nine-volume clerk's record on appeal.

field office, about $629, the amount of an expense item which neither Brook nor petitioner had personally incurred (4-R. 499-500; Exhs. 195-196).

The government also established that petitioner falsely claimed as deductions on his tax returns amounts he allegedly paid to North Georgia Millwright & Erecting Company and Minerva Gay. In 1975, petitioner claimed that he paid North Georgia Millwright & Erecting Company $2,400 in insurance commissions. Richard Sullivan, an employee of North Georgia Millwright, testified that his company was not engaged in the sale of insurance and had received no insurance commissions from petitioner. Sullivan further testified that he had not signed a letter in 1975 indicating that his company had received $2,400 in insurance commissions from petitioner (5-R. 783-785). Petitioner also reported that he paid Minerva Gay $3,572 and $1,660 in insurance commissions for the years 1975 and 1976, respectively (2-R. 74-78; Exhs. 1, 9, 14, 18). Gay testified, however, that she was employed as a domestic for three and a half years from 1973 through 1976, and was paid $65 per week to perform only domestic work (4-R. 586, 588).

ARGUMENT

The decision of the court of appeals does not conflict with prior decisions of this Court or any other court of appeals. The petition raises only highly fact-specific issues that are of importance only in this particular case. Accordingly, review by this Court is not warranted.

1. Petitioner contends (Pet. 6-8) that his conviction should be vacated and he should be granted a new trial because Volume I of the nine-volume record on appeal was lost sometime prior to oral argument and was never completely reconstructed. Petitioner never presented this issue to the court of appeals, either at oral argument or in his

petition for rehearing. In any event, the record on appeal was reconstructed with petitioner's participation, and the only portions missing were requested jury instructions and handwritten notes the jury submitted to the trial court. Petitioner can show no prejudice from these omissions, and it is clear that the court of appeals had an adequate record for review.

Although, as a result of the loss of Volume 1 of the record on appeal and the inability to reconstruct it completely, the court of appeals did not have before it petitioner's requested jury instructions or the handwritten questions the jury submitted to the trial court during deliberations,[4] the court had before it substitutes for those missing documents which were sufficient to enable the court to render a constitutionally adequate review of petitioner's conviction. The petitioner's requested but denied jury instructions and the trial court's responses to the jury's questions were fully described and discussed in both petitioner's and the government's briefs in the court of appeals, both of which were prepared when the full record was still available. The requested jury instructions that the petitioner argues the trial court erroneously refused to give were reproduced verbatim at pages 34-35 and 38 of the government's brief. The questions the jury submitted to the trial court and the trial court's responses to those questions in open court were not only reproduced at pages 41-43 of the government's appellate brief but also were set out at pages 1554-1558 of Volume 9 of the record. Because of the trial court's systematic approach in discussing each of the jury's questions, the transcript of the trial proceedings reflects that the trial court had in fact

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[4]Petitioner asserts (Pet. 7) that the trial court's handwritten responses to the jury's questions were not available to the court of appeals for its review. Nothing in the record, however, indicates that the court's contested responses to the jury's questions were made other than orally in open court, as transcribed at pages 1554-1558 of Volume 9.

read in open court the jury's questions from the original handwritten notes.

A criminal defendant has a right on appeal to a record of sufficient completeness to permit adequate consideration of alleged errors at trial. See *Draper* v. *Washington*, 372 U.S. 487, 499 (1963). There is no requirement, however, that the record must be perfectly complete when suitable alternatives are available. See *Mayer* v. *City of Chicago*, 404 U.S. 189, 194 (1971); *Draper* v. *Washington*, *supra*, 372 U.S. at 495. Obviously, under the particular facts of this case, the court of appeals had before it substitutes for the missing documents which were sufficient to enable the court to conduct a review of petitioner's conviction. The failure to reconstruct perfectly Volume I of the record in no manner prejudiced petitioner's appeal (see *United States* v. *Ullrich*, 580 F. 2d 765, 773 n.13 (5th Cir. 1978); *United States* v. *Selva*, 559 F. 2d 1303, 1305-1306 (5th Cir. 1977)).

In any event, petitioner never presented this issue to the court of appeals. It appears that Volume I of the record on appeal was lost prior to the oral argument in this case (see Pet. 5). During oral argument, however, petitioner did not bring this particular matter to the attention of the court of appeals. Even assuming that petitioner was unaware prior to oral argument that Volume I of the record on appeal had been lost, he was formally notified of that fact by the court of appeals in a letter dated July 10, 1981, the day on which he filed his petition for rehearing and petition for rehearing en banc. Thereafter, he participated in the reconstruction of Volume I of the record. At no time, either by amending his original petition or by filing a supplemental petition, did the petitioner ever advise the court of appeals that he was not satisfied with Volume I of the record on appeal as reconstructed or that he felt that the court could not adequately review the case upon the basis of the record before it. Thus,

the court of appeals has never had an opportunity to consider this matter. This issue, accordingly, presents no ground for review by this Court.[5]

2. Contrary to petitioner's claim, references to forged documents and other remarks made by government counsel during closing argument did not impair petitioner's right to a fair trial.

Petitioner contends (Pet. 9) that during the course of the trial, in establishing its case against him concerning the embezzled funds from Provident, the government referred to several letters which had not been offered into evidence and therefore denied petitioner any opportunity to object to their introduction. The claim is frivolous. These letters, addressed to Provident, purported to be from various companies holding group insurance accounts with Provident and indicated the agent to whom Provident should pay commissions on these group accounts (5-R. 662, 683-685, 752). Four witnesses testified that they had not signed these letters, which purported to be from their companies (*ibid.*). The record shows that petitioner made no objection to the government's references to those letters when the witnesses were questioned about their authenticity (see, *e.g.*, 5-R. 661-664, 682-686, 752). On each occasion, petitioner had a full opportunity to cross-examine the witnesses, but did so

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[5]The issue here is completely unlike the issues presented in *Cole* v. *Arkansas*, 333 U.S. 196 (1948), *United States* v. *Burnett*, 476 F. 2d 726 (5th Cir. 1973), *United States* v. *Butler*, 499 F. 2d 1006 (D.C. Cir. 1974), or *United States* v. *Bryant*, 439 F. 2d 642 (D.C. Cir. 1971), cited by petitioner (Pet. 8). In *Cole*, the petitioner was tried and convicted under one section of a state criminal statute while on appeal his conviction was reviewed under a different section of the same statute. In *Burnett*, the government inadvertently destroyed records which were the object of the appellant's discovery and were directly related to the pending litigation. Both *Butler* and *Bryant* dealt with the government's obligation to disclose evidence material to a defendant's case.

with only two of the four witnesses (5-R. 664-666, 686, 689, 753). Furthermore, the government did attempt to introduce these letters into evidence, but petitioner objected on the basis that the government had failed to establish a foundation for their admissibility (6-R. 897). The government offered proof that the letters were relevant to show that petitioner was manipulating these insurance commissions and diverting them to agencies under his control (6-R. 898). The trial court sustained petitioner's objection and refused to admit the letters into evidence. The trial court, however, properly permitted the testimony about the letters to stand (6-R. 899).

Petitioner's claim (Pet. 9) that in closing argument the government referred to these letters without any evidence implicating him in the forgery of the letters or relating the letters to his receipt of commissions from Provident is unsupportable. Testimony demonstrated that the letters were forged documents. The letters, moreover, directed Provident to pay commissions to entities organized and controlled by petitioner. Under these circumstances, it was reasonable to infer that petitioner systematically forged various documents to obtain insurance commissions outside the salary and bonuses he reported as income earned from Provident.

Petitioner also complains (Pet. 9-10) that the prosecutor referred during closing argument to petitioner as a "wheeler-dealer" and a "con artist." Petitioner made no objection to these comments at trial and, in his charge to the jury, the trial judge instructed the jury that counsel's arguments were not evidence. In any event, these references were neither outrageous nor plain error. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239-240 (1940); *United States* v. *Medel*, 592 F. 2d 1305, 1314-1315 (5th Cir. 1979); *United States* v. *Juarez*, 566 F. 2d 511, 516-517 (5th Cir. 1978); *United States* v. *Wolfson*, 322 F. Supp. 798, 826-827

(D. Del. 1971), aff'd, 454 F. 2d 60 (3d Cir.), cert. denied, 406 U.S. 924 (1972); cf. *United States* v. *Sanchez*, 482 F. 2d 5, 8-9 (5th Cir. 1973). These few comments were not gratuitous rhetorical excesses; rather, they were appropriate responses, in the context of this case, to petitioner's defense that his conduct evidenced mere inadvertence or carelessness in dealing with, for example, his commission income and expense account. See 9-R. 1468-1470. Moreover, a prosecutor may express his view about a defendant if his view is based on evidence in the case and the jurors are not led to believe that other evidence, unavailable to them, justifies that view. *Lawn* v. *United States*, 355 U.S. 339, 359-360 n.15 (1958); *United States* v. *Dawson*, 486 F. 2d 1326, 1330 (5th Cir. 1973). In this case, the evidence established that petitioner had used his position at Provident to direct commissions to insurance agencies under his control, to falsify insurance claims and forge claim drafts to augment his unreported income, and to submit unsubstantiated expense vouchers. Thus, the government's references find support in the record and clearly do not require reversal.

Petitioner's further objection (Pet. 9) that during closing argument the government implied without any factual basis that he was responsible for the disappearance of records from Provident's files, is equally untenable. The record shows that when the manager of the internal audit department at Provident requested the group policy files relating to 58 double-endorsed claim drafts,[6] the Atlanta field office

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[6]An internal audit by Provident had uncovered 58 claim drafts which apparently had been endorsed first by the payee and then by petitioner (2-R. 214-215). At trial, the government alleged that petitioner had embezzled funds from Provident by falsifying medical expense reimbursement claims of individuals purportedly employed by companies covered by Provident's group health and medical insurance plans (3-R. 356; 4-R. 430, 438, 442, 452, 488, 536, 546, 556-558, 600-601; 5-R. 640,

found only one file and in nine other cases only slips indicating that the files had been charged out to petitioner (2-R. 219; 3-R. 389). Clearly, it was within the range of permissible argument to point out to the jury the reasonable inference which could be drawn from the circumstantial evidence introduced—that the unavailability of the files could be attributed to the action of petitioner.

There is no support for petitioner's contention (Pet. 9-10) that by stating during closing argument that "there's far more taxable income due and owing than what's proven there," the prosecutor led the jury to believe that there were other items of unreported income which were not disclosed to the jury. Petitioner never objected to this remark at trial (9-R. 1476). When read in context, it is clear that the government's remarks (*ibid.*) referred to the questionable Provident expense vouchers about which the government had introduced evidence (4-R. 485, 498-502, 552-553; 6-R. 941-951, 990-993, 1012-1020).

3. Petitioner contends (Pet. 10-12) that the trial court abused its discretion in admitting into evidence the government's summary charts (exhibits summarizing the government's proof of unreported income) because certain entries on the charts were not supported by the evidence. There was no error. The determination whether to admit the summary charts into evidence was committed to the sound discretion of the trial court. *United States* v. *Skalicky*, 615 F. 2d 1117, 1120-1121 (5th Cir.), cert. denied, 449 U.S. 832 (1980); *United States* v. *Prevatt*, 526 F. 2d 400, 404 (5th Cir. 1976); *United States* v. *Smyth*, 556 F. 2d 1179, 1184 (5th Cir.),

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691, 706-708, 717, 725-726); forging the signatures of the purported claimants (5-R. 775); signing as the second endorsee (4-R. 524-525; 7-R. 1095); and then cashing the claim drafts himself (3-R. 346-354).

cert. denied, 434 U.S. 862 (1977); Fed. R. Evid. 1006. The entries on the charts were supported by the evidence and no error resulted from their admission.[7]

Petitioner argues (Pet. 11) that income from the double-endorsed claim drafts should not have been included on the charts since the government failed to establish that "the individuals in whose names the drafts had been payable were not, in fact, actually employees of the companies in question." The record shows, however, that in all but two instances representatives from the companies that had group insurance policies with Provident denied that the individuals allegedly making the claims under their group insurance policies had been employed by their companies (3-R. 356; 4-R. 430, 438, 442, 488, 536, 556-558, 590, 600-601; 5-R. 706-708, 717, 725-726). In the two cases where the claimants were employed by the companies, both individuals denied having endorsed the claim drafts (3-R. 413-414; 4-R. 496).

That the summary charts also included items related to an automobile partly paid for by North Georgia Millwright does not, as petitioner argues (Pet. 11-12), undermine the conviction. Contrary to petitioner's contention, the government did introduce evidence during the trial, fully subject to cross-examination by petitioner, to show that North Georgia Millwright paid part of the cost of an automobile that petitioner used on a personal basis (5-R. 794-795). Except for the designations, the government made no entries on the

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[7]Petitioner's general objection during the trial to the admission of the summary charts (6-R. 900-901) is wholly inadequate to sustain his complaint that the admission of the summary charts prejudiced his case. Had petitioner specifically objected during the trial to particular entries as he now does, the trial court could have either deleted them, modified them, or instructed the jury specifically about any evidentiary questions concerning these particular entries.

summary charts with respect to these items, did not charge these items as unreported income, and did not refer to these items during closing argument.

Petitioner further claims (Pet. 12) that the government prejudiced his case by leaving on the summary charts, without adequate supporting evidence, references for 1974 and 1975 to corrections of a prior audit. The adjustments entered on the summary charts for 1974 and 1975 were in petitioner's favor (6-R. 854). Petitioner has no possible complaint that this item prejudiced his case.[8]

Immediately after admitting the summary charts over the petitioner's objection, the trial court cautioned the jury that such charts were not evidence but admitted only to assist the jury in understanding the government's case, and that any conflict between the charts and the underlying evidence should be resolved in favor of the underlying evidence (6-R. 901-902). Contrary to petitioner's suggestion (Pet. 10-11), there is no requirement that a trial court repeat such a cautionary instruction in its final charge to the jury.[9]

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[8]Petitioner has erroneously reproduced the government's summary chart with respect to this item. The government entered no amount for this item. The $629.16 shown on petitioner's reproduction (Pet. 4) is the amount of the check petitioner received from E.C. Brook for reimbursed business expenses (see pages 2-3, *supra*).

[9]The absence of prejudice is further shown by the fact that although the summary charts contained entries for all years from 1973 through 1976, the jury convicted only for 1975 and 1976. This amply demonstrates the jurors' ability to scrutinize the charts and to accept or reject items based solely on their own recollections of the evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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